Supreme Court, U.S.
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No. 89-1849

SUPREME COURT OF THE UNITED STATES

October Term, 1990

In re GERALD E. MANSELL

GERALD E. MANSELL, *Petitioner*,
v.
GAYE M. MANSELL, *Respondent*

Petition for Writs of Mandamus or Certiorari to the Court of Appeal of California, Fifth Appellate District, and the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal of California, Fifth Appellate District, or
for
Entry of Judgment by this Court

Reply to Brief in Opposition to Petition for Writs of Mandamus, Certiorari, or for Entry of Judgment

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QUESTIONS PRESENTED

1. Whether California's "reinterpretation" of its original opinion is a sophistic subterfuge to disobey this Court's mandate, to evade this Court's jurisdiction, and to usurp federal jurisdiction and divide Petitioner's Veterans Administration Disability Benefits without subject matter jurisdiction.

2. Whether California's non-compliance with this Court's mandate should be remedied through entry of judgment by this Court.

3. Whether California may characterize and divide Veterans Administration Disability Benefits as community property upon dissolution of marriage despite the anti-attachment protections of 38 U.S.C. §3101, which positively require by direct enactment that the disabled veteran actually receive the benefits.

PARTIES

a. Petition for writ of mandamus or entry of judgment:

GERALD E. MANSELL, *Petitioner*, and
THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT, and the Honorable JAMES ARDAIZ, WILLIAM STONE, and GEORGE BROWN, Justices of the Court of Appeal of California, Fifth Appellate District, *Respondents*.

b. Petition for writ of Certiorari:

GERALD E. MANSELL, *Petitioner*,
GAYE M. MANSELL, *Respondent*.

c. Since Petitioner contends that application of California Civil Code §4800(a) to divide his Veterans Administration disability compensation as community property offends Art. VI of the United States Constitution, 28 U.S.C. §2403(b) may be applicable, and the Attorney General of the State of California is being served pursuant to Rule 29.4(c) of this Court.

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I
THE BRIEF IN OPPOSITION MISREPRESENTS CALIFORNIA LAW BY CLAIMING THAT COLLATERAL REMEDIES ARE NOT AVAILABLE

Respondent contends that only three remedies are available in California to attack final judgments (Opposition Brief [Opp], page 1 & 3). However, Respondent did not provide this Court with the entire text of California Code of Civil Procedure §473. What Respondent conspicuously omitted from her version of the statute is the last paragraph, which provides, in relevant part:

> "The court * * * * may, on motion of either party after notice to the other party, **set aside any void judgment or order."**

Respondent's failure to provide the court with the entire relevant text of the statute is another disingenuous, but simplistic attempt to avoid the federal question concerning preemption of subject matter jurisdiction by 38 U.S.C. §3101. She and the California courts have done this throughout the entire history of this case.

Nevertheless, Respondent concedes that Major Mansell has preserved the issue at every stage of the proceedings (Opp, 6).

II
THE PETITION IS APPROPRIATE BECAUSE *RES JUDICATA* DOES NOT PRECLUDE COLLATERAL ATTACKS ON JUDGMENTS THAT ARE VOID FOR WANT OF SUBJECT MATTER JURISDICTION

In its second opinion (Petition, App.G), the California Court of Appeal unequivocally acknowledged that California law allows collateral attack on judgments that are void for want of subject matter jurisdiction.

> "As we have indicated *ante,* Husband contends the instant judgment was void for want of subject matter jurisdiction. This contention, if true, would be a **proper basis for attacking the judgment** (emphasis added, Petition, App.G, page 8).

Nevertheless, the Court of Appeal refused to address Major Mansell's jurisdictional challenge based on 38 U.S.C. §3101. However, under the Supremacy Clause of the United States Constitution, Article VI, the states are required to acknowledge and enforce federal statutes (*Testa v. Katt*, 330 U.S. 386 (1947); *Miller v. Municipal Court*, 22 Cal.2d 818, 841, 851 (1943)).

III
THE JUDGMENT IS VOID BECAUSE STATE SUBJECT MATTER JURISDICTION OVER VETERANS' DISABILITY BENEFITS IS ABSOLUTELY PREEMPTED BY 38 U.S.C §3101

A state divorce decree, like other law governing the economic aspects of domestic relations, must give way to

clearly conflicting federal enactments (*Ridgway v. Ridgway,*, 454 U.S. 46, 54-55 (1981)). In the present case, Major Mansell, as a recipient of V.A. disability benefits, is fully protected by the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. §3101), which shields V.A. disability benefits from every form of legal process, except for child support (*Rose v. Rose*, 481 U.S. 619, n.6 (1987)).

Section 3101(a) provides, in relevant part:

> (a) "[V.A. disability benefits] **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.** ****".(*emphasis added.*)

It is difficult to envision a clearer expression of congressional intent to preempt state subject matter jurisdiction. Therefore, California courts have no power to deal with V.A. disability benefits.

Since the present judgment orders distribution of Major Mansell's V.A. disability benefits to his former wife, it violates §3101 and is therefore void for lack of subject matter jurisdiction and is subject to this collateral attack.

CONCLUSION

For these reasons, a Writ of Mandamus should issue, directed to the California Court of Appeal, Fifth Appellate District and the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal, directing that judgment be entered declaring that

petitioner's Veterans Administration disability compensation is his separate property; or

This Court should enter final judgment declaring that petitioner's Veterans Administration disability compensation is his separate property; or

A Writ of Certiorari should issue, directed to the California Court of Appeal, Fifth Appellate District, for consideration of whether petitioner's Veterans Administration disability compensation is protected from community property division upon dissolution of marriage by 38 U.S.C. §3101.

Respectfully Submitted,

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June, 1990.

APPENDIX

California Code of Civil Procedure §473.
Amending Pleadings--Continuance--Relief from Mistake, Inadvertence, Surprise or Excusable Neglect; Time Limit; Affidavit of Merits Not Required--Correcting Clerical Errors--Setting Aside Void Judgments or Orders.

The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her

through his or her mistake, inadvertence, surprise, or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; provided, however, that in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying said party and his or her attorney of record, if any, that such order, judgment or other proceeding was taken against him or her and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any resulting default judgment entered against his or her client unless

the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

Whenever the court grants relief from default judgment based on any of the provisions of this section, the court may: (1) impose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or defaulting party, (2) direct that an offending attorney pay an amount no greater that one thousand dollars ($1,000) to the State Bar Client Security Fund or (3) grant such other relief as is appropriate.

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.